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No. 83-991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALUMINUM COMPANY OF AMERICA
AND TAPOCO, INC.,
Petitioners,

VS.

UTILITIES COMMISSION OF THE STATE
OF NORTH CAROLINA, ET AL.,
Respondents.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF RESPONDENTS STATE OF TENNESSEE AND TENNESSEE OFFICE OF ECONOMIC AND COMMUNITY DEVELOPMENT IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the abstention doctrine, which counsels against unnecessary federal interference in local matters of concern only to a single state, have any proper application when a state agency is attempting to allocate scarce natural resources in which a second neighboring state has an equally strong competing interest?

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Respondents State of Tennessee and Tennessee Office of Economic and Community Development ("OECD") submit this brief in support of the petition for a writ of certiorari which has been submitted in this case.

STATEMENT OF RESPONDENTS' INTEREST

This case raises the important question of whether the economic benefits of a valuable natural resource are to be

allocated between the States of North Carolina and Tennessee by respondent North Carolina Utilities Commission ("NCUC") or by an impartial federal agency, the Federal Energy Regulatory Commission ("FERC").

Petitioner Tapoco, Inc. ("Tapoco") operates four dams on the Little Tennessee River in Tennessee and North Carolina. Consistent with Tapoco's FERC-regulated power supply agreements and its federal operating license, the inexpensive hydroelectric power which Tapoco generates at these dams has been dedicated to supplying the needs of "Tennessee Operations," a large aluminum plant which petitioner Aluminum Company of America ("Alcoa") operates in Blount County, Tennessee. Alcoa's Tennessee Operations is one of the largest employers in East Tennessee, and its economic viability, which depends on the continued availability of inexpensive electric power, is a matter of great importance to the State of Tennessee and its citizens.

The controversy which led to this litigation arose when the NCUC, in the guise of setting the local retail rates of Nantahala Power & Light Company ("Nantahala"), adopted an administrative order which was intended to give Nantahala's North Carolina customers "first call" on all of Tapoco's low-cost hydroelectric power, including the power which Tapaco generates at its two dams located within the State of Tennessee. This attempt by the NCUC to appropriate the economic benefit of Tapoco's power has an obvious adverse effect on the interests of Tennessee and its citizens. The NCUC's orders interfere with Tennessee's prerogatives as a sovereign, because it is Tennessee, rather than North Carolina, which has the right to regulate Tapoco's use of its dams in Tennessee, to the extent that Tapoco's activities have not been preemptively regulated at the federal level. From an economic and social standpoint, the NCUC's decision creates the danger that Alcoa may curtail pro-

duction at Tennessee Operations, resulting in unemployment and economic hardship in East Tennessee.[1]

ARGUMENT

The Court Should Grant The Petition And Reverse The Court Of Appeals To Insure That Cases Involving The Competing Interests Of Two States Will Be Resolved By Impartial Federal Tribunals.

The Court of Appeals, relying on cases such as *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), and *Younger* v. *Harris*, 401 U.S. 37 (1971), held that the federal courts should abstain from adjudicating the petitioners' claims that the NCUC's orders contravened the preemptive regulatory scheme of the Federal Power Act and placed an impermissible burden on interstate commerce. As one of the sovereign states of the Union, Tennessee recongnizes the importance of the abstention doctrine to the functioning of the federal system, and endorses the rule that, in the absence of exceptional circumstances, the federal courts should not interfere in state proceedings which concern matters of substantial and legitimate concern to the state. This, however, is not such a case. Although the NCUC disingenuously claims to have done nothing more than establish Nantahala's local retail rates, it is clear from the face of the NCUC's orders

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[1] To protect these interests as sovereign and *parens patriae* in this litigation, Tennessee and OECD sought leave to intervene below as parties plaintiffs. The District Court denied their intervention motion, and, on appeal, the Court of Appeals affirmed this ruling. Because the issue of whether intervention is appropriate is largely committed to the discretion of the lower courts, Tennessee and OECD have not petitioned this Court for a writ of certiorari to review this aspect of the Court of Appeals' decision. If this Court, however, grants the petition of Alcoa and Tapoco, and the case is ultimately remanded to the District Court, Tennessee and OECD would expect to renew their motions to intervene, in reliance on the District Court's statements that it would entertain renewed motions for intervention if circumstances changed. *See* Appendix D to the Petition, at 24a.

that the NCUC has attempted to address the question of how the benefits of Tapoco's low-cost hydroelectric power, which is concededly sold in interstate commerce, should be allocated among customers located in North Carolina and Tennessee. This is not an issue in which North Carolina alone has an interest, but one which is of equally compelling importance to another state, Tennessee. Because the issue which the NCUC attempted to regulate is not one solely of local concern, the basic rationale of the abstention doctrine, that the federal courts should not meddle unnecessarily in an individual state's internal affairs, has no application in a case such as this.

Abstention in a preemption case such as this would not advance considerations of comity and federalism, but would instead merely reward one state, North Carolina, which has ignored this Court's clear directive that it may not attempt to give its own citizens preferential access to scarce natural resources, *New England Power Company* v. *New Hampshire*, 455 U.S. 331 (1982), to the detriment of a second state, Tennessee, which has respected the preemptive effect of the Federal Power Act and the Interstate Commerce Clause. If, as the NCUC's orders stated, North Carolina is free first to determine that Tapoco and Nantahala constitute a "single" interstate utility system and then to reallocate the power generation and costs of the "combined" system in a way which gives North Carolina customers "first call" on all of the inexpensive hydroelectric power generated by both Nantahala and Tapoco, what in fairness or logic is to prevent the State of Tennessee from making the same determination that the two companies are a "single" system, but directing that all of its valuable hydroelectric output must go to Tennessee, rather than North Carolina?

Regardless of whether Tapoco and Nantahala are treated as one system or two, the question of how their power supply arrangements allocate hydroelectric power and costs between them must be regulated ty the FERC, the impartial agency in which Congress has lodged exclusive jurisdiction over such

questions of interstate commerce. *F.P.C.* v. *Southern California Edison Company*, 376 U.S. 205 (1964). Unless companies like Alcoa and Tapoco, which are the parties directly subject to state orders contravening the federal regulatory scheme, are free to seek relief from the federal trial courts, the federal administrative framework which Congress has adopted for reconciling competing state interests will be in danger of collapse, to be replaced by squabbling among the states as state utility commissions seek to advance their constituents' parochial economic interests at the expense of their neighbors.[2]

The importance of having impartial federal tribunals decide important issues of concern to more than one state is demonstrated by the facts of this case. The NCUC's orders which reallocate the economic benefits of Tapoco's power to North Carolina customers were entered pursuant to the direction of the North Carolina Supreme Court that the NCUC was to consider what was in the "best interest" of Nantahala's local North Carolina customers. *State ex rel. Utilities Commission* v. *Edmisten*, 299 N.C. 432, 434, 263 S.E.2d 583, 586 (1980). Neither the North Carolina Supreme Court's opinion, nor the decisions which the NCUC adopted on remand, contain any discussion or consideration whatsoever of the interests of Tennessee and its citizens in the low-cost hydroelectric power which Tapoco generates. Further, after the District Court in this case denied Tennessee's intervention motion and dismissed this ac-

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[2] It should be emphasized that a state utilities commission which believes that a utility's power supply agreements are unreasonable or unfair to local customers has a full and effective remedy at the FERC. Indeed, since the Fourth Circuit's decision in this case, the NCUC itself has initiated a proceeding at the FERC which seeks to order Tapoco to supply power to Nantahala for the benefit of Nantahala's North Carolina customers. This proceeding is styled *North Carolina Utilities Commission* v. *Tapoco, Inc; Nantahala Power and Light Company;* and *Aluminum Company of America*, FERC Docket No. EL84-2-000.

tion, Tennessee sought leave to file a brief as *amicus curiae* in the North Corolina Court of Appeals, to which the NCUC's orders had been appealed by Alcoa and Tapoco, and to call to that court's attention Tennessee's interest in the controversy. The North Carolina court, however, refused to accept Tennessee's brief, and its decision of December 6, 1983 affirming the NCUC, like the earlier decisions and orders entered in the case, makes no effort to analyze the impact which the NCUC's actions will have on Tennessee and its citizens. Surely the considerations of comity and federalism which underlie the abstention doctrine cannot properly be invoked to shield from federal scrutiny the actions of state courts and agencies which have refused even to consider the important interests of a neighboring state in the matter before them.

Thus Tennessee submits that the District Court and the Fourth Circuit have misconstrued the nature of the abstention doctrine and have erred in denying Tennessee a federal forum in which to assert its vital interests in this matter.

CONCLUSION

For the reasons stated above and in the petition of Alcoa and Tapoco, this Court should grant a writ of certiorari to review the decision of the Court of Appeals in this case.

Respectfully submitted,

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